A

MOHD NAHAR ABU BAKAR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZAHAR MOHAMED JCA
MOHD ZAWAWI SALLEH JCA
[NO: B-05-371-2010]
22 MAY 2013

C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Interested witness - Whether evidence to be viewed with suspicion - Facts and circumstances of case - Whether linked accused to murder - Whether accused person's conduct admissible*

D

under s. 8(2) Evidence Act 1950 - Whether accused knew that act of stabbing would cause death - Whether defence an afterthought - Whether witness credible despite not being able to identify accused during identification parade - Whether reasonable doubt arose in prosecution's case

E

EVIDENCE: *Relevancy - Conduct and reaction of accused - Whether proved nexus and linked accused to crime - Whether justified necessity for explanation - Whether conduct and reaction challenged during cross-examination - Evidence Act 1950, ss. 8(2) & 9*

F

EVIDENCE: *Conflicting testimony - Findings of fact of trial judge - Contradicting scenario with regards to defence - Failure to confront factual assertions to prosecution witnesses - Whether defence an afterthought - Whether trial judge made correct findings*

G

EVIDENCE: *Identification parade - Failure of witness to identify accused - Identification parade held six years after attack - Whether a factor to consider - Whether identification can be by way of circumstantial evidence - Whether accused stranger to witness - Whether witness's evidence together with other evidence connected accused to crime - Whether*

H

witness concocted version of events

In the High Court, the appellant was convicted and sentenced to death for the murder of Siti Rohana ('first deceased') and Muhammad Nur Osama ('second deceased'). Normah Jantan

I

('SP13') was the biological mother of Siti Aishah ('SP15') and Aizat Asmawi ('Awi'). Ever since SP15's birth, SP13's cousin and his wife, the first deceased, took care of SP15. The first deceased was also the babysitter of the second deceased. SP13 was having

a relationship with the appellant. On the fateful day, the appellant brought SP13 and Awi in his car and went to the flats where the first deceased lived. The appellant, who was wearing a white shirt and black jeans, told SP13 to wait inside the car while he visited his friend. Upon the appellant's return, SP13 saw blood stains on the appellant's shirt. He informed SP13 that his hand was injured and looked agitated when SP13 asked too many questions. SP15 testified that when she was watching television on that fateful day, the appellant arrived at the house and was chatting with the first deceased. When the first deceased asked for SP13's contact number, the appellant gave her a card. Suddenly, SP15 heard a loud noise and she saw the first deceased was strangled and thereafter, stabbed by the appellant. When the police arrived at the scene, they found the bodies of both the first and second deceased and also recovered a Rambo knife. In his defence, the appellant denied his involvement with the murder and testified that he sustained injuries to his hand after he got into a fight with his friend. The High Court found the appellant guilty and hence, this appeal. The conviction and sentence imposed upon the appellant were challenged on the following grounds, *ie*, (i) SP13 was related to SP15 and the first deceased which would make her an interested witness; (ii) there was no evidence to implicate the appellant; and (iii) SP15 could not identify the appellant at the identification parade and the *Turnbull* guidelines were not satisfied.

Held (dismissing appeal; affirming decision of High Court)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The mere fact that SP13 was the biological mother of SP15 did not mean that her evidence must automatically be viewed with suspicion. Her evidence was entitled to credence until cogent reasons for disbelief could be advanced in light of evidence to the contrary and surrounding circumstances. Hence, the submission that SP13 was an interested witness was without basis. (para 27)

(2) SP13 was neither partisan nor was she in any way inimical to the appellant. In fact, SP13 was having a courtship and was very much in love with the appellant. Further, the mere fact that the witness was closely related to the deceased was not sufficient reason to disregard her testimony. The relationship of SP13 with the first deceased did not render her clear and positive evidence less worthy of full faith and credit. (paras 30 & 31)

(3) The prosecution had established, *inter alia*, that (i) both the deceased were stabbed using a Rambo knife ('exh. P10B'); (ii) SP13 confirmed that the appellant owned a Rambo knife in which the description matched exh. P10B; and (iii) SP13 saw blood stains on the appellant's shirt and his hand was also injured. Further, SP13's evidence on the appellant's conduct and reaction was not challenged by the defence during cross-examination and were clearly admissible under s. 8(2) of the Evidence Act 1950 ('the Act'). (paras 34 & 36)

(3a) Viewing the appellant's conduct and reaction in light of the facts and circumstances of the case, there was no doubt that it proved the nexus and linked the appellant to the crime. Further, the appellant's conduct and reaction justified the necessity for some explanation from him pursuant to s. 9 of the Act (*Parlan Dadeh v. PP*; refd). (paras 36 & 37)

(4) The prosecution relied on limb (d) of s. 300 of the Penal Code. In such a case, the prosecution must establish that the appellant knew that the act of stabbing was so imminently dangerous that it must in all probability cause death or such bodily injury as it was likely to cause death. The appellant's conduct in striking at both the deceased person's vital spots with great force showed that it was done with a desire to do great harm. (paras 38 & 39)

(5) In the court below, the appellant never suggested as a defence that he was never in the house on that fateful day. The only challenge to SP15's evidence was that the appellant left shortly after he gave a card to the first deceased. According to the appellant, someone else stabbed the deceased and denied having set foot at the crime scene. By creating a contradicting scenario regarding his defence, the appellant had failed to confront these factual assertions to the respective prosecution's witnesses. Hence, the learned trial judge did not err in holding that the defence was an afterthought. (paras 40 & 41)

(6) It is trite that evidence of identification should be approached with caution. SP15's failure to identify the appellant was due to the fact that the identification parade was held six years after the attack. However, during trial, SP15 was able to demonstrate the direction from which the

first deceased was stabbed by the appellant. In the circumstances, the trial judge found SP15 to be a credible witness and she would not have concocted the version of events. (para 47, 48 & 49)

(7) Identification can be by way of circumstantial evidence. The assailant was not a total stranger to SP15. SP15's evidence, considered with all the other evidence, led towards an irresistible inference that it was the appellant who was at the crime scene on that fateful day. Further, there was ample evidence to support the prosecution's case and these evidences were independent testimony which affected the appellant by connecting him to the crime. (paras 51, 52 & 54)

(8) The appellant had advanced an improbable defence in the form of a bare denial. The defence, when tested against the totality of the prosecution's evidence, could not raise a reasonable doubt on the prosecution's case. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, perayu telah disabitkan dan dihukum mati berikutan pembunuhan Siti Rohana ('si mati pertama') dan Muhammad Nur Osama ('si mati kedua'). Normah Jantan ('SP13') merupakan ibu kandung Siti Aishah ('SP15') dan Aizat Asmawi ('Awi'). Sejak kelahiran SP15, sepupu SP13 dan isterinya, si mati pertama, telah menjaga SP15. Si mati pertama juga merupakan pengasuh si mati kedua. SP13 telah mengadakan hubungan dengan perayu. Pada hari kejadian, perayu membawa SP13 dan Awi dengan keretanya dan pergi ke flat di mana si mati pertama tinggal. Perayu, yang memakai baju kemeja berwarna putih dan seluar jeans berwarna hitam telah memberitahu SP13 supaya menunggu di dalam kereta sementara perayu pergi berjumpa dengan kawannya. Setelah perayu pulang ke kereta, SP13 telah melihat tompokan darah pada kemeja perayu. Perayu memberitahu SP13 bahawa tangannya mengalami kecederaan dan dia kelihatan gelisah apabila SP13 menanya lebih banyak soalan. SP15 memberi keterangan bahawa pada hari kejadian, semasa dia sedang menonton televisyen, perayu telah sampai dan berbual dengan si mati pertama. Apabila si mati pertama meminta nombor telefon SP13, perayu telah memberi sekeping kad kepadanya. Tiba-tiba, SP15 terdengar bunyi yang kuat dan melihat si mati pertama dicekik dan kemudiannya, ditikam oleh perayu. Apabila pihak polis sampai ke

tempat kejadian, mereka telah menemui mayat-mayat si mati pertama dan kedua dan juga menjumpai sebilah pisau Rambo. Dalam pembelaannya, perayu telah menafikan penglibatannya dengan pembunuhan tersebut dan menyatakan bahawa kecederaan yang dialami olehnya adalah berpunca daripada satu pergaduhan di antara perayu dan kawannya. Mahkamah Tinggi mendapati perayu bersalah dan oleh itu, rayuan ini. Sabitan dan hukuman yang dijatuhkan terhadap perayu dicabar atas alasan-alasan berikut, iaitu, (i) SP13 mempunyai hubungan dengan SP15 dan si mati yang membuatkannya seorang saksi berkepentingan; (ii) tiada keterangan untuk membuat implikasi terhadap perayu; dan (iii) SP15 tidak dapat mengecam perayu semasa kawad cam dan garis panduan *Turnbull* tidak dipatuhi.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Fakta bahawa SP13 merupakan ibu kandung SP15 tidak bermakna bahawa keterangannya dipertimbangkan dengan perasaan sangsi. Keterangannya boleh dipercayai sehingga alasan munasabah untuk tidak mempercayainya boleh dikemukakan berdasarkan kepada keterangan yang bercanggah dan keadaan sekeliling. Oleh itu, hujahan bahawa SP13 adalah saksi berkepentingan adalah tanpa asas.

(2) SP13 tidak memihak kepada mahu pun dalam apa jua cara mempunyai permusuhan dengan perayu. Pada hakikatnya, SP13 mempunyai perhubungan dan mencintai perayu. Tambahan, fakta bahawa saksi mempunyai hubungan rapat dengan si mati bukanlah suatu alasan munasabah untuk mengabaikan keterangannya. Perhubungan SP13 dengan si mati pertama tidak membuatkan keterangan jelas dan positifnya mempunyai nilai kebolehpercayaan yang rendah.

(3) Pihak pendakwaan telah membuktikan, antara lain, bahawa (i) kedua-dua si mati telah ditikam dengan menggunakan pisau Rambo ('exh. P10B'); (ii) SP13 mengesahkan bahawa perayu memiliki pisau Rambo yang mana diskripsinya berpadanan dengan exh. P10B; dan (iii) SP13 telah melihat

tompokan darah pada kemeja perayu dan tangannya juga cedera. Selanjutnya, keterangan SP13 mengenai tindakan dan reaksi perayu tidak dicabar semasa soal balas dan oleh itu jelas boleh diterima di bawah s. 8(2) Akta Keterangan 1950 ('Akta'). A

(3a) Merpertimbangkan tindakan dan reaksi perayu berdasarkan kepada fakta dan keadaan kes, tiada keraguan bahawa ia membuktikan pertalian antara perayu dengan jenayah yang berlaku. Tambahan, tindakan dan reaksi perayu menjustifikasikan keperluan untuk penjelasan daripadanya berdasarkan s. 9 Akta (*Parlan Dadeh v. PP*; dirujuk). B C

(4) Pihak pendakwaan bergantung kepada cabang (d) s. 300 Kanun Keseksaan. Dalam keadaan sebegitu, pendakwaan mesti membuktikan bahawa perayu mengetahui tindakan menikam adalah bahaya di mana dalam semua kebarangkalian, punca kematian atau pun kecederaan badan boleh menyebabkan kematian. Tindakan perayu dalam menikam kedua-dua si mati di bahagian penting dengan daya yang kuat menunjukkan bahawa ia dibuat dengan niat untuk menyebabkan kecederaan. D E

(5) Di mahkamah bawahan, perayu tidak mencadangkan, sebagai pembelaan, bahawa dia tidak ke rumah tersebut pada hari kejadian. Satu-satunya cabaran terhadap keterangan SP15 adalah bahawa perayu telah meninggalkan tempat kejadian selepas memberi kad kepada si mati pertama. Menurut perayu, terdapat orang lain yang telah menikam si mati dan menafikan bahawa dia berada di tempat kejadian. Dengan mewujudkan keadaan bercanggah terhadap pembelaannya, perayu gagal mencabar penegasan faktual ini terhadap saksi-saksi pendakwaan. Oleh itu, yang arif hakim tidak khilaf bahawa pembelaan merupakan suatu fikiran kemudian. F G

(6) Adalah matan bahawa keterangan berkenaan pengecaman mesti dikendalikan secara berhati-hati. Kegagalan SP15 untuk mengecam perayu adalah disebabkan bahawa kawad cam diadakan enam tahun selepas serangan itu. Walau bagaimanapun, semasa perbicaraan, SP15 dapat menunjukkan arah dari mana si mati pertama telah ditikam oleh perayu. Dalam keadaan tersebut, hakim perbicaraan mendapati bahawa SP15 merupakan saksi yang boleh dipercayai dan dia tidak mungkin telah mereka versi kejadian tersebut. H I

(7) Pengecaman boleh berlaku melalui keterangan ikut keadaan. Penyerang bukanlah seorang yang asing kepada SP15. Keterangan SP15, dipertimbangkan dengan keterangan lain, menjurus kepada inferens yang tidak dapat disangkal bahawa perayu berada di tempat kejadian pada hari tersebut. Tambahan, terdapat banyak keterangan yang menyokong kes pendakwaan dan keterangan-keterangan ini adalah keterangan bebas yang menjejaskan kepada perayu dengan mengaitkannya dengan jenayah tersebut.

(8) Perayu telah mengemukakan pembelaan yang tidak benar dalam bentuk penafian kosong. Pembelaan, apabila diuji terhadap keseluruhan keterangan pendakwaan, tidak dapat membangkitkan keraguan munasabah terhadap kes pendakwaan.

Case(s) referred to:
AEG Carapiet v. AY Derderian AIR 1961 Cal 359 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Balasingham v. PP [1959] 1 LNS 8 HC ***(foll)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Emperor v. Dhirajia AIR 1940 All 486 ***(refd)***
Heng Aik Ren Thomas v. PP [1998] 3 SLR 465 ***(refd)***
Jadunath Singh v. State of UP 1971 SC 363 ***(refd)***
Liow Siow Long v. PP [1969] 1 LNS 98 HC ***(foll)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(foll)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Muniandy Subramaniam v. PP [2006] 6 MLJ 623 ***(refd)***
Ong Teng For & Anor v. PP [2013] 1 CLJ 39 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Richard Devadasan Sabariah [2004] 4 CLJ 367 CA ***(refd)***
PP v. Sanin Othman [2011] 1 CLJ 626 CA ***(refd)***
R v. Turnbull & Ors [1976] 3 All ER 549 ***(refd)***
ST Shinde v. State of Maharashtra AIR 1974 SC 791 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 8(2), 9, 133A
Penal Code, ss. 300, 302

Other source(s) referred to:
Ratanlal and Dhirajlal's, Laws of Crimes, 2nd edn, p 1455

For the appellant - K Viknesvaran; M/s Viknes Ratna & Co
For the respondent - Najib Zakaria; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This is a judgment with which all members of the court agree.

[2] Challenge in this appeal is the conviction and sentence imposed upon the appellant herein, by the High Court Shah Alam, Selangor. The appellant was charged and tried for two offences of murder punishable under s. 302 of the Penal Code. At the end of the defence case, the appellant was convicted and sentenced to death.

[3] We heard the appeal on 3 January 2013 and dismissed it for lack of merit. The conviction and sentence passed by the High Court were affirmed.

The Charges

[4] The charges proffered against the appellant are as follows:

1st Charge:

Bahawa kamu pada 30.12.2003 jam lebih kurang 1 petang di rumah No. 19, Tingkat 5 Flat Cempaka Bandar Baru, Klang telah melakukan bunuh dengan sengaja menyebabkan kematian seorang perempuan Melayu bernama Siti Rohana bt Bahrum kad pengenalan 690727-10-5032, oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

2nd Charge:

Bahawa kamu pada 30.12.2003 jam lebih kurang 1 petang di rumah No.19, Tingkat 5 Flat Cempaka Bandar Baru, Klang telah melakukan bunuh dengan sengaja menyebabkan kematian seorang budak lelaki bernama Muhammad Nur Osama mykid no. 010908-

A 10-1303, oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[5] In order to appreciate the issues raised by the appellant in this appeal, the following salient facts of the case must be noted.
B

The Prosecution's Case

[6] Normah Jantan (SP13) is the biological mother of Siti Aishah (SP15) and Aizat Asmawi (Awi). Ever since her birth, SP15 was
C cared by SP13's cousin, Muhamad bin Jaafar (SP9) and his wife, Siti Rohana (the first deceased). The first deceased was also the babysitter of the second deceased.

[7] SP13 informed the court that at the material time, she was
D having a relationship with the appellant. On 2 December 2003, she and Awi visited SP9 and the first deceased at their home. They were accompanied by the appellant. After the visit, SP13 left Awi under the care of SP9 and his wife. Awi returned to his mother on the following week.

E **[8]** On 29 December 2003, the appellant went to the first deceased's house to take back Awi's clothing, while SP13 and Awi waited in the car. They left in the appellant's car an hour later. The appellant asked SP13 the value of a chest length gold necklace in which SP13 estimated at RM1,000.
F

[9] SP15 was present in the house during both visits by the appellant.

[10] On 30 December 2003, the appellant took SP13 and Awi
G with his car and they again went to the Cempaka flat. The appellant told SP13 to wait inside the car while he visited his friend. The appellant was wearing a white shirt and black jeans.

[11] The appellant returned an hour later and took something from the bonnet. He later switched on the engine and informed
H SP13 he would return in 5-10 minutes.

[12] The appellant only returned after 30 minutes. SP13 saw blood stain on the right side of the appellant's white shirt. The appellant told SP13 that his hand was injured. The appellant was
I agitated because SP13 was asking too many questions.

[13] The appellant later stopped at a mosque where he changed his clothes. The couple spent the night at Shah Alam. The appellant later abandoned SP13 at the express bus station.

[14] SP15 recounted the events of that fateful day. She was watching the TV programme when the appellant arrived at the house. The appellant was chatting with the first deceased. The first deceased asked for SP13's contact number. The appellant then left the house momentarily and returned with a card.

[15] The appellant gave the card to the first deceased. The first deceased attempted to call SP13 but failed.

[16] Suddenly, SP15 heard a loud noise. She saw the appellant strangled the first deceased, and stabbed the first deceased on her chest. SP15 then escaped from the house and sought help from her neighbour, Aliza bin Husin (SP6). SP6 saw a man in white shirt and black trousers escaped through the staircase.

[17] Amran bin Sembak (SP14) was at the parking lot when a man in white shirt and black trousers run passed him and almost collided with him.

[18] When the police arrived at the scene, they found the bodies of both first and second deceased. A Rambo knife (army knife) was recovered by Zamin bin Zamaluddin (SP10) at the bottom of the stairways. Dr Seah Lay Hong (SP11) confirmed that the DNA profile found on the knife belonged to both the first and second deceased.

[19] Dr Abdul Karim (SP17) who conducted the post mortem found two stab wounds on the first deceased. One stab wound measured 4 x 0.5cm, was located on the right forearm. The other stab wound located on the right parasternal was in an 'L' shape, measured 5 cm x 2 cm. The doctor testified that both the right lung and heart were cut. The stab wounds caused massive bleeding which resulted in the death of the first deceased.

[20] SP16 testified that the second deceased was stabbed twice from behind. The first stab wound only penetrated beneath the skin. The second stab wound measured 4.5cm x 2cm was located at the paravetebral region. The second deceased's right lung, liver and diaphragm were cut. The second deceased died from the fatal stab wound.

[21] SP16 testified that the stab wounds on both the deceased would have been caused by a sharp object. The Rambo knife was shown to SP16 and he testified that the knife had the size and shape that is compatible with the wounds inflicted.

[22] After subjecting the prosecution's evidence to a maximum evaluation by following the guidelines laid down in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, and *Balachandran v. PP* [2005] 1 CLJ 85, the learned trial judge found that the prosecution had proved a *prima facie* case and called upon the appellant to enter his defence.

The Defence's Case

[23] The appellant gave evidence under oath. In a nutshell, the defence of the appellant was that at the material time, he was a drug pusher and also a drug addict. The purpose for being at the scene of the crime was to meet his friend and client, Wan Gemuk. They were taking drugs near the garbage disposal area. He injured his hand after the two of them got into a fight when Wan Gemuk was unable to settle his debt.

The Appeal

[24] Before us, the conviction and sentence imposed upon the appellant were challenged on the following grounds:

(i) SP13 is related to SP15 and the first deceased which would make her an interested witness;

(ii) There was no evidence to implicate the appellant; and

(iii) SP15 could not identify the appellant at the identification parade and the *Turnbull* guidelines were not satisfied;

[25] We will discuss each of the grounds of appeal in turn.

Ground (i): Interested Witness

[26] In the course of the submission, learned counsel for the appellant contended that SP13's evidence ought to be rejected as she was an interested witness due to her familial relation with SP15 and the first deceased, and for that reason SP13's evidence lacked credibility.

[27] After having perused the records and scrutinised SP13's evidence in its entirety, especially how she fared in the course of cross-examination, we are of the considered view that the complaint by learned counsel that SP13 was an interested witness was without basis. The mere fact that SP13 was the biological mother of SP15 does not mean that her evidence must automatically be viewed with suspicion. Her evidence is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (see *Balasingham v. PP* [1959] 1 LNS 8; [1959] 1 MLJ 193, *Ong Teng For & Anor v. PP* [2013] 1 CLJ 39).

[28] In the *Laws of Crimes by Ratanlal and Dhirajlal* (2nd edn.) at p. 1455, the following is said in respect of 'related witnesses':

> 'Related' is not equivalent to 'interested'. The term 'interested' postulates that the person concerned has some direct interest in the result of the litigation such as interest in decree in a civil case or in seeing that the accused is punished. A witness who is a natural one but relative of the victim cannot be termed as interested. Close relationship of witness to the deceased is no ground to reject his testimony if otherwise it is reliable. On the contrary, close relative of the deceased would normally be most reluctant to spare the real assailant and falsely implicate an innocent one (*State v. Kalki* AIR 1981 SC 1390).

[29] In *Liow Siow Long v. PP* [1969] 1 LNS 98, Raja Azlan Shah J (as His Majesty then was) speaking on the same subject, held as follows:

> It is difficult to accept that suggestion that if a witness is shown to be a relation of the deceased his evidence is tainted. Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses are competent witness who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses eg, they are either partisans of the complaint or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon. In my view the circumstances relied upon by counsel is not sufficient to cast any doubt on the evidence of PW1, who is not proved to be inimical to the appellant ..."

[30] Applying the same principle to the present case, we are of the view that SP13 was neither partisan nor was she in any way inimical to the appellant. In fact, SP13 was having a courtship and was very much in love with the appellant. The evidence showed that she was willing to follow the appellant anywhere even though she knew the appellant was a drug addict.

[31] We cannot accept the submission advanced by learned counsel for the appellant that SP13 was biased because she was related to the first deceased. The mere fact that the witness is closely related to the deceased is not sufficient reason to disregard her testimony. The relationship of SP13 to the first deceased does not render her clear and positive evidence less worthy of full faith and credit.

Ground (ii): There Is No Evidence To Implicate The Appellant

[32] In considering this ground, we will review the evidence adduced at the stage of the prosecution that justified the calling of the defence, and test it against the defence evidence. After all, an appeal is a continuation of the trial. (See *Muniandy a/l Subramaniam v. PP* [2006] 6 MLJ 623; *PP v. Sanin Othman* [2011] 1 CLJ 626).

[33] It is trite that in a charge of murder, the prosecution must establish:

(i) the death of both deceased,

(ii) the death was caused by the accused,

(iii) the accused intended to (a) cause death or (b) intended to cause bodily injury as the accused knows to be likely to cause the death or (c) intended to cause bodily injury and the injury intended to be inflicted in the ordinary cause of nature to cause death or (d) the accused knew that his act was so imminently dangerous and it must in all probability cause death or such bodily injury as is likely to cause death. (See s. 300 of the Penal Code).

[34] After having scrutinised the whole evidence adduced before the court, we are satisfied that the prosecution had established that:

(i) Both of the deceased were stabbed using a Rambo knife (exh. P10B);

(ii) SP13 confirmed that the appellant owned a Rambo knife in which the description matched exh. P10B;

(iii) The stabbings occurred at the vital parts of the bodies;

(iv) SP6 saw a man in white shirt and black trousers fled the scene. The attire of the assailant matched the clothing worn by the appellant;

(v) SP9 testified that SP15 told him that the 'uncle' stabbed the first deceased; and

(vi) SP13 saw blood stains on the appellant's shirt and his hand was also injured.

[35] SP13 informed the court that after the appellant returned from meeting his friend, he was nervous and agitated. The appellant remained the same throughout the entire night until the next morning. After the appellant left SP13 at the bus station, the appellant conveyed a message to SP13 through a third party and reminded SP13 to keep a low profile for a while until the news die down.

[36] SP13's evidence on the appellant's conduct and reaction was not challenged by the defence during cross-examination. His conduct and reaction were clearly admissible under s. 8(2) of the Evidence Act 1950. Viewing the appellant's conduct and reaction in the light of the facts and circumstances of the case, there is no doubt that it proved the nexus and linked the appellant to the crime (See *Parlan Dadeh v. Public Prosecutor* [2009] 1 CLJ 717).

[37] To our mind, there is no need for the appellant to behave in such manner and to skip town, unless he was connected to the double murder. His conduct and reaction, therefore justifiably necessitated some explanation from him pursuant to s. 9 of the same Act (See *Parlan Dadeh (supra)*).

[38] In the present case, the prosecution relied on limb (d) of s. 300 of the Penal Code. In such a case, the prosecution must establish that the appellant knew that the act of stabbing was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.

[39] The conduct of the appellant in striking at a vital spot of both deceased with great force shows it was done with a desire to do great harm. However primitive a man can be, the appellant must be taken to have known that what he did was imminently dangerous that it must in all probability cause bodily injury likely to cause death (See *Emperor v. Dhirajia* AIR 1940 All 486).

[40] As regards the defence put forth by the appellant, we agree with the finding of the learned trial judge that the defence is an afterthought. In the court below, the appellant never suggested, as a defence, that he was never in the house on that fateful day. The only challenge to SP15's evidence was that the appellant left shortly after he gave a card to the first deceased. According to the appellant, someone else stabbed the deceased. When the appellant testified, he denied having set foot at the crime scene. By creating a contradicting scenario regarding his defence, the appellant had failed to confront these factual assertions to the respective prosecution's witnesses.

[41] Perusing the appeal records and especially the cross-examination of SP17 and SP18, we find that nowhere was it suggested that the appellant had informed the investigation officers of his whereabouts when the double murder took place and the existence of Wan Gemuk. There was no explanation as to the belated disclosure. By raising it at the eleventh hour and only at the defence stage, no opportunity was given to the prosecution to verify its truthfulness. Therefore, we find that the learned trial judge did not err in holding that the defence was an afterthought.

[42] In the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, Edgar Joseph SCJ (as he then was) had this to say:

> The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up to his sleeve', so to speak, and be branded as a recent invention.

(See also *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154, *AEG Carapiet v. AY Derderian* AIR 1961 Cal 359).

[43] The next issue to be considered is whether the appellant's defence has raised a reasonable doubt. In this regard, we remind ourselves of the principle of law that the degree of cogency, need not reach certainty, but it must carry a high degree of probability (See *Miller v. Minister of Pensions* [1947] 2 All ER 372).

[44] The appellant denied being involved in the double murder. However, in his defence, the appellant had not dealt with the prosecution's other strands of evidence. He did not explain why he was nervous, agitated after meeting a friend near the crime scene. No challenge was put across against SP13's evidence that the appellant reminded her to keep a low profile. The inference to be drawn from the evidence of conduct of the appellant against the background of other evidence is that the appellant was involved in the crime and was evading detection by the police.

[45] We are in full agreement with the trial judge's finding that at the stage of the defence the appellant advanced an improbable defence in the form of bare denial. The defence, when tested against the totality of the prosecution's evidence, could not raise a reasonable doubt to the prosecution's case.

Ground (iii): Non-compliance Of The Turnbull Guidelines

[46] Learned counsel further submitted that the prosecution's case centered around SP15's evidence as she witnessed the attack. However, since she could not identify the appellant and the proviso to s. 133A of the Evidence Act 1950 was not complied with, there was no evidence to implicate the appellant.

[47] We agree with the trial judge's reasoning that SP15's failure to identify the appellant is due to the fact that the identification parade was held six years after the attack. His Lordship found SP15 a credible witness and she would not have concocted the version of events.

[48] It is trite that evidence of identification should be approached with caution. The reliability of the identification evidence depends on a non-exhaustive list of factors such as the length of time that the witness observed the accused, the distance

A at which the observation was made, the presence of obstructions in the way of the observation, the presence of special reasons for the witness to remember the accused etc. (See *R v. Turnbull & Ors* [1976] 3 All ER 549, *Heng Aik Ren Thomas v. PP* [1998] 3 SLR 465).

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[49] SP15 informed the court that on that fateful day, 'uncle' (the appellant) spent a substantial amount of time at the house with the first deceased. They were seen having a conversation. She was positive that it was 'uncle' who stabbed her mother. She C could even demonstrate the direction from which the first deceased was stabbed. When asked who the 'uncle' is, she said that 'uncle' came to her house with SP13 previously.

[50] SP9 also confirmed that when the appellant visited the house, SP15 addressed him as 'uncle'. SP9 informed the court D that immediately after the incident; SP15 informed him that 'uncle' (the appellant) was the person who attacked the first deceased. Other prosecution witnesses also testified that the culprit who escaped from the crime scene was wearing the same clothing as the appellant. SP13 also described that the appellant suffered a E hand injury, and there was blood stain on his shirt. The appellant was also seen behaving strangely as he was constantly nervous and agitated.

[51] Identification can be by way of circumstantial evidence. (See F *ST Shinde v. State of Maharashtra* AIR 1974 SC 791, *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (rep) 101; [1983] 2 MLJ 232). The assailant was not a total stranger to SP15. To that extent, the identification parade was less importance that if the assailant had been unknown persons whom G the eye-witness had to identify. (See *Jadunath Singh v. State of UP* 1971 SC 363).

[52] The learned trial judge had found that SP15 to be a witness of truth. We see no reason to disturb His Lordship's finding. H SP15's evidence, considered with all other evidence, leads towards an irresistible inference that it was the appellant who was at the crime scene on that fateful day.

[53] SP15 was 15 years old when she gave evidence. Section I 133A of the Evidence Act 1950 provides that a conviction cannot stand on the uncorroborated evidence of an unsworn child (See *PP v. Richard Devadasan Sabariah* [2004] 4 CLJ 367; [2005] 3 MLJ 17).

[54] In the instant case, as demonstrated above, there is ample evidence to support the prosecution's case. These evidence are independent testimony which affects the appellant by connecting him to the crime. In our considered view, SP15's evidence was only the icing to the cake. Therefore, learned counsel's submission that SP15's evidence was not corroborated is without merit.

Conclusion

[55] In conclusion, we are satisfied that at the end of the trial, the prosecution had proved a case beyond reasonable doubt. All the evidence when bound together, point towards the guilt of the appellant.

[56] The appeal is dismissed and the conviction and sentence passed by the High Court affirmed.